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in the

Supreme Court

of the

United States

OCTOBER TERM, 1972

NO. 72-986

WESTERN VENTURES, INC.,
Petitioner,

vs.

DADE DRYDOCK CORPORATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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MIAMI REVIEW — 371-4853 — 377-3721

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INTRODUCTORY PARAGRAPH

Petitioner, WESTERN VENTURES, INC., prays that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Fifth Circuit, entered in this cause on the 19th day of October, 1972, denying Petitioner indemnity from Respondent, DADE

DRYDOCK CORPORATION, for Petitioner's legal expenses in the successful defense of a personal injury action brought by an employee of Respondent shiprepairer against Petitioner shipowner.

OPINIONS BELOW

The Findings of Fact and Conclusions of Law of the United States District Court for the Southern District of Florida, dated November 13, 1970, were not reported. They are appended to this Petition (Appendix A), as is that Court's Partial Final Summary Judgment as to Claim of Manuel Diaz, Plaintiff, dated December 4, 1970, also unreported (Appendix B). The opinion of the District Court as to Petitioner's right to indemnity from Respondent for legal expenses (Appendix C), dated September 3, 1971, was reported in 331 F.Supp. 1296 (S. D. Fla. 1971). That same Court's Order of October 5, 1971, denying a Petition for Reconsideration, was not reported and is likewise appended to this Petition (Appendix D).

The Opinion of the United States Court of Appeals for the Fifth Circuit, dated October 19, 1972, affirming the lower-court decision, was reported in 467 F.2d 1361 (5th Cir. 1972) (Appendix E).

JURISDICTION

The Judgment of the United States Court of Appeals for the Fifth Circuit was entered on October 19, 1972. No Petition for Rehearing and no Motion to Stay Mandate were filed in the Fifth Circuit. The jurisdiction of this Court is invoked under the provisions of 28 U.S.C.A. § 1254 (1).

QUESTIONS PRESENTED

1. Whether the District Court's denial of indemnity from Respondent for legal expenses incurred by Petitioner in the successful defense of a personal injury action brought by an employee of Respondent against Petitioner, which denial was affirmed by the United States Court of Appeals for the Fifth Circuit, is in conflict with prior decisions of the United States Court of Appeals for the Fourth Circuit and with a previous decision of the United States Court of Appeals for the Fifth Circuit.

2. Whether such a denial constitutes a decision on an important federal question which has not been, but should be, settled by this Court.

3. Whether such a denial so far departs from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

PROCEDURAL RULE INVOLVED

Rule 14, Fed. R. Civ.P., 28 U.S.C.A. Rule 14, is involved by virtue of Petitioner's use of that Rule in filing and serving a Third-Party Complaint against Respondent. The provisions of Rule 14, Fed. R. Civ.P., are set forth in full in Appendix F.

STATEMENT OF THE CASE

The original complaint was filed in Admiralty by Manual Diaz ("Diaz"), a shiprepairman and employee of

DADE DRYDOCK CORPORATION ("DADE DRYDOCK") against WESTERN VENTURES, INC., ("WESTERN VENTURES"), the owner of a vessel upon which Diaz was allegedly injured. The complaint alleged that while the vessel "Western Venturer" was in drydock at DADE DRYDOCK, Diaz was injured as a result of the unseaworthiness of the vessel and the negligence of WESTERN VENTURES.

The Defendant, WESTERN VENTURES, denied the material allegations of the complaint and set forth affirmative defenses, including the defenses that the injury occurred at a time when the vessel was in the exclusive control of DADE DRYDOCK and that if the alleged negligence or unseaworthiness caused the injury, such negligence or unseaworthiness was caused solely by DADE DRYDOCK.

Pursuant to Rule 14 of the Federal Rules of Civil Procedure, WESTERN VENTURES filed and served a Third-Party Complaint against DADE DRYDOCK alleging that at the time of the injury to Diaz, DADE DRYDOCK was engaged as an independent contractor in repairing vessels, and that it was DADE DRYDOCK's duty to provide repairs to Third-Party Plaintiff's vessel and to provide a safe place on the vessel for DADE DRYDOCK's employees to work. The Third-Party Complaint further alleged that DADE DRYDOCK, in undertaking to perform the contract, impliedly warranted to WESTERN VENTURES that the contract would be performed in good and workmanlike manner, and that if any injury to Diaz was not caused by his own negligence, it was caused by the Third-Party Defendant's breach of the aforesaid implied warranty. The second count of the Third-Party Complaint prayed for indemnity from DADE DRYDOCK in

the event Diaz recovered a judgment from WESTERN VENTURES, together with attorneys' fees and costs.

DADE DRYDOCK answered the Third-Party Complaint and denied the material allegations of the pleading.

The action was tried before the District Court without a jury, and at the conclusion of the trial the Court entered detailed findings of fact and conclusions of law (A. 1-6) finding, among other things, that Diaz had failed to prove that he sustained any injuries aboard the M/V "Western Venturer". The findings of fact determined that at the time of the injury the "Western Venturer", owned by WESTERN VENTURES, was undergoing repairs at DADE DRYDOCK and that Diaz based his claim of negligence and unseaworthiness on violations of safety and health regulations for ship repairing.

The Court entered a partial final judgment against Manuel Diaz (A. 7-8) and in favor of WESTERN VENTURES and retained jurisdiction of the issues between the Third-Party Plaintiff, WESTERN VENTURES, and the Third-Party Defendant, DADE DRYDOCK, pertaining to WESTERN VENTURES' claim for indemnity for costs and attorneys' fees for the successful defense. After the entry of the judgment, the Third-Party Plaintiff and Third-Party Defendant filed motions for summary judgment on the indemnity issue. Thereafter the Court granted the Third-Party Defendant's motion for summary judgment, ruling that WESTERN VENTURES was not entitled to indemnity for attorney's fees and costs. (A. 9-12).

WESTERN VENTURES appealed to the United States Court of Appeals for the Fifth Circuit from the

Order dated September 3, 1971, granting the Third-Party Defendant's Motion for Summary Judgment, and from the Order dated October 5, 1971, denying Third-Party Plaintiff's Petition for Reconsideration of that Order. (A. 13-14). On October 19, 1972, the United States Court of Appeals for the Fifth Circuit issued its Opinion and Judgment affirming the Judgment of the District Court. (A. 15-20).

REASONS FOR GRANTING THE WRIT

In upholding the decision of the District Court to deny Petitioner indemnity against Respondent for Petitioner's legal expenses in the successful defense of Plaintiff's claim, the United States Court of Appeals for the Fifth Circuit upheld the District Court's holding that a finding of a breach of warranty of workmanlike performance is a prerequisite to an award of attorney's fees under the applicable law of indemnity. (A. 18).

Such a decision is in direct conflict with the decision of the United States Court of Appeals for the Fourth Circuit in *American Export Lines v. Norfolk Shipbuilding and Drydock Corp.*, 336 F.2d 525, 1965 A.M.C. 167 (4th Cir. 1964). In that case an employee of a shipyard who was injured while repairing and deactivating a vessel sued the shipowner for his injuries. The shipowner filed an indemnity action against the shipyard, and the district-court jury found the shipyard solely responsible and awarded the shipowner indemnity from the shipyard for the former's legal expenses. On appeal, the shipyard contended that, since the ship was "dead" when the injury occurred, the shipowner had no potential liability and, therefore, no right to indemnity. In affirming the award of legal expenses to the shipowner for his successful de-

fense of the lawsuit, the Fourth Circuit answered the shipyard's contention by noting that:

> "This does not mean, however, that there was no potential liability, for that issue is to be resolved by us not by an examination of testimony adduced at the trial but by an examination for [sic] the situation as it existed when [plaintiff's] suit was begun.
>
> • • •
>
> "[W]hen the ship was served with the complaint it could not in justice to itself or its indemnitor decline to defend. That there was no liability had to be demonstrated in a trial of the issues raised. Certainly no lawyer could have guaranteed a successful defense. On the face of the pleadings a claim for liability was asserted." 336 F.2d at 527.

In that same case, the Fourth Circuit went on to make the argument that Petitioner made in its appeal to the Fifth Circuit, and which the Fifth Circuit's Opinion characterized as a "scare" argument. (A. 19). The Fourth Circuit commented:

> "If the ship's counsel had been less diligent and a judgment had resulted, unquestionably the ship would have been entitled to indemnity. The ship should not be penalized for its success. A rule denying indemnity where a ship successfully defends would only 'place a premium on losing lawsuits'. Massa v. C. A. Venezuelan Navigacion, 1964 AMC 1375, 332 Fed. (2nd) 779 (2nd Cir. 1964), and would encourage half hearted efforts on the part of ship's counsel. Moreover, such a

rule might in the long run be more expensive to indemnitors than the rule we lay down here." 336 F.2d at 527.

Moreover, the Writ of Certiorari should issue because the Opinion of the Fifth Circuit in the instant case conflicts with the previous law in the Fifth Circuit, as expressed in *Hill v. Flota Mercante Grand Columbiana S.A.*, 267 F.Supp. 380 (E.D. La. 1967), *aff'd*, 405 F.2d 878 (5th Cir. 1969), *cert. denied*, 395 U.S. 934 (1969). In that case, the Plaintiff longshoreman could not establish the unseaworthiness of the vessel, and the district court awarded indemnity to the shipowner against the stevedore for the costs of defense of the longshoreman's action. In affirming the liability aspect of the case, the Fifth Circuit described the opinion below as "excellent". That opinion contains the following language directed to the question of indemnity:

> "Eddie Lee Hill's suit is groundless. But someone must bear the costs of its defense. Either the owner must bear its own expense, simply because it was sued, without sound reason, by the stevedore's employee, or the stevedore must make the owner whole. The cost arose directly from the stevedore's operation, and the claim arose from its own employee, who was injured by his own negligence. His injury was not occasioned by the negligence of either the shipowner or the stevedore. At the time of trial his claim had narrowed to the contention that he was too big for the hatch opening. If anyone could have guarded at all against the claim, it was the stevedore who hired him. In addition the cost of this type of suit ap-

> pears at the present to be an inevitable economic consequence of the stevedoring operation. The stevedore can best handle it as part of the economic burden of its operations passing it along as it does other costs. Finally, we should not disregard the ancient legal principle that urges that, when an expense must be borne by one of two innocent parties, it should be placed on the one whose act permitted the loss to occur. For these reasons, as between owner and stevedore, the loss should fall on the stevedore." [Footnote omitted.] 267 F.Supp. at 384.

The availability of this type of indemnity constitutes an important federal question not previously decided by this Court, in question within the Fifth Circuit, and in conflict between the Fourth and Fifth Circuits. Accordingly, Petitioner respectfully submits that it is a question that should be settled by this Court.

Finally, the Writ of Certiorari should issue because the decision of the Fifth Circuit, by relying on an argument from hindsight rather than foresight, has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. In the instant case, Petitioner was charged with a violation of the Federal safety and health regulations for ship repairing, which if proven by Plaintiff would not only have rendered Petitioner liable, but would also have made Respondent liable to Petitioner for full indemnity, including attorneys' fees and costs. *Manning v. M/V Sea Road*, 417 F.2d 603 (5th Cir. 1969); *Provenza v. American Export Lines, Inc.*, 324 F.2d 660 (4th Cir. 1963), *cert. denied*, 376 U.S. 952 (1964). Such indemnity was denied

on the basis of the final outcome of the litigation. As Petitioner argued below, a shipowner's right to indemnity from a shipyard ought not to hinge on whether or not the shipowner successfully defends the Plaintiff's lawsuit, since it is the allegations of the Complaint *and not the result of the trial*, which gives rise to the shipowner's duty to defend and, if successful, to his right to indemnification for legal expenses.

Moreover, the equitable principle that the liability should fall upon the party best fitted to adopt preventive measures would likewise support the awarding of legal expenses to Petitioner. Petitioner's vessel was in Respondent's yard, and Respondent was therefore the party in the best position to prove what Petitioner ultimately proved: that the Plaintiff was not on the vessel at all. Yet it was Petitioner's counsel that undertoook to convince the trial court, over Plaintiff's own testimony, that Plaintiff sued the wrong vessel. Such diligence on the part of Petitioner's counsel earned Petitioner, strangely enough, the denial of a right to indemnity which Petitioner would otherwise have unquestionably enjoyed. It is neither accepted nor usual in judicial proceedings to penalize a party for a job well done.

CONCLUSION

For the foregoing reasons, Petitioner prays that this Court issue a Writ of Certiorari in this cause.

Respectfully submitted,

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1301 Alfred I. duPont Building
Miami, Florida 33131
Attorneys for Petitioner

By JAMES W. CRABTREE

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that three true copies of the foregoing Petition were delivered to CAREY, DWYER, AUSTIN, COLE & SELWOOD, P.A., Attorneys for Dade Drydock Corporation, Respondent/Third-Party Defendant, 650 Seybold Building, Miami, Florida, and JOHN H. LEWIS, ESQ., Attorney for Plaintiff, 1008 Concord Building, Miami, Florida, 33130, and mailed to RAYMOND GREENE, ESQ., Co-Counsel for Dade Drydock Corporation, 254 Security Trust Building, Miami, Florida 33131 on January 11, 1973.

By JAMES W. CRABTREE

Of Counsel

APPENDIX A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

NO. 70-159-Civ-CF

MANUEL DIAZ,

Plaintiff,

v.

WESTERN VENTURES, INC., etc.,

Defendant,
Third Party
Plaintiff,

v.

DADE DRYDOCK CORPORATION, etc.,

Third Party
Defendant.

[Filed Nov. 17, 1970]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

THIS CAUSE being an action in admiralty brought by a ship repairman for personal injuries and lost income against a vessel owner and the vessel owner having filed a third party action for indemnity against the shipyard and the cause having come on to be heard before the

undersigned on the 21st and 22nd day of October, 1970, sitting without a jury and having heard the testimony of the parties, received into evidence various documentary exhibits, and upon due consideration the Court makes and enters the following partial findings of fact and conclusions of law as to the main action:

FINDINGS OF FACT

1. That by stipulation of the parties hereto made at the pre-trial conference, the amount of Defendant's costs and attorneys' fees to be awarded the Defendant with respect to its claim for indemnity against the Third Party Defendant, DADE DRYDOCK CORPORATION, has been severed from the issues tried herein, said amount to be determined by this Court after further hearing.

2. On September 25, 1967, the Plaintiff, MANUEL DIAZ, was employed by DADE DRYDOCK CORPORATION as an outside machinist and continued in the employ of said DADE DRYDOCK CORPORATION through the 2nd day of November, 1967, when he alleges that he was injured. DADE DRYDOCK CORPORATION is a corporation engaged in repairing vessels and was at the time in question located within the city limits of Miami, Florida.

3. At all times material hereto the Defendant, WESTERN VENTURES, INC., was the owner of the vessel "Western Venturer," a converted LSM type vessel, which vessel was not available for inspection and/or photographing during the times preceding the trial of this cause because the vessel had been lost at sea.

4. On or about October 23, 1967, WESTERN VENTURES, through its Marine Superintendent, Earl Truesdell, requested that DADE DRYDOCK bid on repairs to the "Western Venturer." In connection with this request for bid, Truesdell sent DADE DRYDOCK a letter dated October 23, 1967, and accompanying documents. (Plaintiff's Exhibit No. 1). In response to these documents, DADE DRYDOCK CORPORATION, through its Vice-President, Donald F. Carpenter, sent WESTERN VENTURES a quotation dated October 26, 1967. (Defendant's Exhibit No. 7).

5. The "Western Venturer" came to DADE DRYDOCK on October 30, 1967, and was put into drydock on November 1, 1967, and thereafter refloated on November 3, 1967.

6. Certain repairs were accomplished to the "Western Venturer" for which DADE DRYDOCK issued its Invoice 9402 (Plaintiff's Exhibit No. 3), the same being paid by the Defendant, WESTERN VENTURES, INC.

7. The Plaintiff, MANUEL DIAZ, alleged and sought to prove that on or about November 2, 1967, he was injured aboard the M/V "Western Venturer" as a result of the negligence of the owner of the vessel and the unseaworthiness of the vessel, basing these claims on the absence of floor plating or decking in the engine steering room of the vessel, the existence of a pipe in said engine steering room and the absence of any light in said room, all being in violation of the Safety and Health Regulations for Ship Repairing (Title 29-Chapter 13, Part 15.01 et seq. C.F.R.).

8. The Plaintiff testified that he was injured on November 2, 1967, while entering a dark engine steering room on a vessel, the injury allegedly occurring when he stepped through the door onto a pipe which rolled under his foot causing him to fall between the frames, there being no decking over the frames. He did not have a flashlight at the time he attempted to enter and admitted that he would not have fallen if he had a light. He further admitted that he "took a chance" by entering the room without a light. The Plaintiff testified that John Albrecht, a fellow-employee, helped him out of the engine steering room after the fall. On cross-examination the Plaintiff admitted that he did not know the name of the vessel on which he fell but his supervisor told him the name of the vessel. He testified as to various details of the appearance of the vessel but was unable to recognize photographs of the engine steering room of the sister ship of the M/V "Western Venturer," which vessel was identical to the "Western Venturer," according to Earl Truesdell, the Defendant's Port Representative.

9. Steve Gallechio, the Plaintiff's supervisor at the time in question, testified that he didn't know the name of the vessel on which the Plaintiff fell and John Albrecht testified that he did not witness Plaintiff's injury nor did he help the Plaintiff out of the engine steering room after the fall. Earl Truesdell, the Defendant's Port Representative, testified as to various details of the "Western Venturer" which did not to any extent coincide with Plaintiff's description of the vessel upon which he was injured. Truesdell further testified that he was in the engine steering room on the day prior to the alleged accident and the day after the alleged accident and the lights in said room were working.

10. The Court finds that it cannot and does not accept Plaintiff's version of the alleged accident as credible and worthy of belief and, accordingly, based upon the entire testimony including that of Truesdell, whose honesty and credibility impressed the Court, the Court finds that the Plaintiff did not sustain any injuries aboard the M/V "Western Venturer" as alleged and complained of in this litigation.

11. The type of repairs which the Plaintiff alleges he was attempting to perform at the time of the alleged injury and which Plaintiff completed after the alleged injury, to-wit, the replacement of studs around the rudder posts' packing glands and the repacking of the rudder posts' packing glands was not traditional seaman's work. The evidence showed that these type of repairs were home port structural repairs which had to be performed while the vessel was out of the water and in drydock and consequently the Court finds that the ship in any event was out of navigation at the time of the alleged injury.

CONCLUSION

1. This Court has jurisdiction of the parties and of the subject matter hereof.

2. This Court concludes that the Plaintiff has failed to prove by the preponderance of the evidence that he was injured aboard the Defendant's vessel, M/V "Western Venturer," on November 2, 1967, or that said injuries were proximately caused by the negligence of the Defendant or the unseaworthiness of the vessel.

3. This Court concludes that the type of work which the Plaintiff was performing at the time in question was not traditional seaman's work and that the vessel in question was not in navigation at the time in question and consequently the Plaintiff was not entitled to any warranty of seaworthiness from the Defendant.

4. That the Defendant, WESTERN VENTURES, INC., shall within ten (10) days from the date hereof file a Memorandum of Law with regard to its right to recover attorneys' fees and costs incurred in the defense of this action from the Third Party Defendant, DADE DRY-DOCK CORPORATION.

5. That the Defendant, WESTERN VENTURES, INC., shall forthwith submit a Final Judgment to be entered consistent with these findings of fact and conclusions of law.

DONE AND ORDERED at Miami, Florida, this 13 day of November, 1970.

/s/ Charles B. Fulton

CHIEF JUDGE, UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF FLORIDA

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

NO. 70-159-Civ-CF

MANUEL DIAZ,

Plaintiff,

v.

WESTERN VENTURES, INC., etc.,

Defendant,
Third Party
Plaintiff,

v.

DADE DRYDOCK CORPORATION, etc.,

Third Party
Defendant.

[Filed (Date Illegible)]

PARTIAL FINAL JUDGMENT AS TO CLAIM OF MANUEL DIAZ, PLAINTIFF

THIS CAUSE having been tried before me, sitting without a jury, and after having heard all of the evidence and pursuant to the findings of fact and conclusions of law heretofore entered in this cause on the 13th day of November, 1970, it is

ORDERED, ADJUDGED AND DECREED that judgment be and the same is hereby entered in favor of the Defendant, WESTERN VENTURES, INC., a Florida corporation, as Owner of the Motor Vessel "Western Venturer," and against the Plaintiff, MANUEL DIAZ, the Defendant, WESTERN VENTURES, INC., to go hence without further day; and, it is

ORDERED, ADJUDGED AND DECREED that judgment be and the same is hereby entered in favor of the Defendant, WESTERN VENTURES, INC., and against the Plaintiff, MANUEL DIAZ, for costs herein expended, said costs to be taxed by the Clerk of this Court in the manner so provided, and it is, further

ORDERED AND DECREED that as to the issues between Third Party Plaintiff, WESTERN VENTURES, INC., and the Third Party Defendant, DADE DRYDOCK CORPORATION, this Court pursuant to said findings of fact and conclusions of law hereby retains jurisdiction in order to determine the right of Third Party Plaintiff to recover from Third Party Defendant attorneys' fees and costs incurred by Third Party Plaintiff in the defense of this action.

DONE AND ORDERED at Miami, Florida, this 4 day of December, 1970.

/s/ Charles B. Fulton

CHIEF JUDGE, UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF FLORIDA

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

NO. 70-159-Civ-CF

MANUEL DIAZ,

Plaintiff,

vs.

WESTERN VENTURES, INC., etc.,

Defendant, Third Party Plaintiff,

vs.

DADE DRYDOCK CORPORATION, etc.,

Third Party Defendant.

[Filed September 9, 1971]

ORDER

This cause came before the Court upon motions for summary judgment filed by the defendant/third party plaintiff, Western Ventures, Inc., and by the third party defendant, Dade Drydock Corporation. The issue is whether the defendant/third party plaintiff is entitled to indemnification from the third party defendant for the expenses of defending this action.

This was an action in admiralty brought by Manuel Diaz, a ship repairman, for personal injuries and lost income against the owner of a vessel upon which the plaintiff was allegedly injured. The defendant-vessel owner filed a third party action for indemnification against the plaintiff's employer, Dade Drydock. The case was tried before the Court, and on November 13, 1970, the Court entered its findings of fact and conclusions of law. Since the plaintiff was unable to name the vessel or accurately identify the vessel upon which he was allegedly injured and since testimony as to various details of the defendant's vessel did not coincide with the plaintiff's description of the vessel on which he was injured, the Court found that the plaintiff failed to prove that he was injured aboard the defendant's vessel.

Generally, in a case of this nature, a defendant-vessel owner may seek indemnity for any judgment entered against it from the plaintiff's employer upon the theory that the plaintiff's injuries were, in fact, caused by a breach of the warranty of workmanlike performance. Delaneuville v. Simonsen, F.2d (5th Cir. 1971); Massa v. C.A. Venezuelan Navigacion, 332 F.2d 779, 782 (2nd Cir. 1964); Paliaga v. Luckenbach Steamship Co., 301 F.2d 403, 408 (2nd Cir. 1962); Schwartz v. Compagne General, 405 F.2d 270 (2nd Cir. 1968). The employer is obligated to indemnify the defendant because of this breach, if proven, and this obligation extends to the litigation expenses of defending suits brought against the shipowner. Massa v. C.A. Venezuelan Navigacion, 332 F.2d 779 (2nd Cir. 1964); Guarracino v. Luckenbach Steamship Co., 333 F.2d 646 (2nd Cir. 1964). Even where the defendant-vessel owner successfully defends the action, he may still be entitled to indemnification from the employer for the costs of the

successful defense. Guarracino v. Luckenbach Steamship Co., 333 F.2d 646, 648 (2nd Cir. 1964); Hirstius v. Hess Terminal Corp., 286 F. Supp. 566 (E.D. La. 1966); Strachan Shipping Co. v. Koninklyke Nederlandsche SMNV, 324 F.2d 746 (5th Cir. 1963).

> While the shipowner has been successful in defense of the main action, he has suffered loss, in the form of attorneys fees and expenses . . . caused by the stevedore's employees . . . in breach of the warranty of workmanlike service.

Guarracino v. Luckenbach Steamship Co., 333 F.2d at 648. To deny to the successful defendant indemnification for fees and costs would place too great a premium upon losing.

However, the doctrine of implied warranty of workmanlike performance can only be invoked by a shipowner to recover indemnity from an independent expert who had control over and performed services traditionally done by vessel employees, but who performed such services in a careless or negligent manner. The warranty is breached when the employee's fault causes the injuries. Where there is no breach of the warranty, there can be no indemnification, for the employer is only liable for the fault of his employees — he does not insure every shipboard mishap in which his employees are involved.

This rationale applies, too, where the defendant-vessel owner wins the actions, but seeks indemnification for the expenses of the litigation. Denaro v. United States, 337 F.2d 275, 277 (2nd Cir. 1964). In Denaro, the Court said:

> The United States [defendant] is not entitled to be indemnified by [the plaintiff's] employer . . . for the legal expenses incurred in defending itself, for the District Judge found, with ample support in the record, that there was no breach of the warranty of workmanlike service.

See Strachan Shipping Co. v. Koninklyke Nederlandsche Stoomboot Maalschappy, 324 F.2d 746, 747 (5th Cir. 1963) (indemnification only where breach of warranty found).

In the present case, the plaintiff Diaz was not able to prove that he was even on board the defendant's vessel when he was allegedly injured. This was an apparent case of mistaken vessel identity. There was no breach of the implied warranty of workmanlike services. That issue never arose, because the plaintiff was unable to prove the threshhold issue — that he was aboard the defendant's vessel. As already stated, where there is no breach of the warranty of workmanlike performance, there can be no indemnification. Thereupon, it is

ORDERED and ADJUDGED that no attorney's fees or costs will be awarded in this action as indemnification against the third party defendant, Dade Drydock. Defendant/third party plaintiff's motion for summary judgment is hereby denied, and the third party defendant's motion for summary judgment is hereby granted.

DONE and ORDERED at Miami, Florida, this 3 day of September, 1971.

/s/ Charles B. Fulton

Chief Judge

cc: Smathers & Thompson
Cary, Dwyer, Austin, Cole & Selwood, P.A.

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

NO. 70-159-Civ-CF

MANUEL DIAZ,

Plaintiff,

v.

WESTERN VENTURES, INC., etc.,

Defendant, Third Party Plaintiff,

v.

DADE DRYDOCK CORPORATION, etc.,

Third Party Defendant,

[Filed October 6, 1971]

ORDER

This cause came before the Court upon defendant/third party plaintiff's petition for reconsideration of this Court's order of September 3, 1971, filed on September 9, 1971. As a basis for its motion, defendant/third party plaintiff has cited Hill v. Flota Mercante Gran Columbiana, S.A., 267 F.Supp. 380 (E.D. La. 1967), aff'd per curiam, 405 F.2d 878.

The Court has reviewed its order of September 3, 1971, and the Hill case and finds no basis upon which to vacate its order. In the Hill case, Judge Rubin placed liability to indemnify on the stevedore/employer not on the basis of a breach of warranty but on a basis of equity — when an expense must be borne by one of two innocent parties, it should be placed on the one whose act permitted the loss to occur. It may be that in Hill, the employer/stevedore could have prevented the occurrence by not employing a man too big to fit through a hatch. But in the present case, Diaz's employer could do nothing to prevent Diaz from suing the wrong vessel.

Furthermore, one who seeks equity must do equity. In this case, the shipowner, who now seeks indemnification for its attorney's fees, was the one who brought a third party action against the employer, Dade Drydock, when it is quite possible that the shipowner knew its defense would be mistaken vessel identity and the presence of the employer would not have been necessary.

Finally, the Court receives no guidance from the Per Curiam affirmance of Judge Rubin's decision. It may be that Hill was affirmed on the equities present in that case but absent in the case before the Court. Thereupon, in the absence of a breach of an implied warranty of workmanlike performance and the equities of the Hill case, the petition for reconsideration is hereby denied.

DONE and ORDERED at Miami, Florida, this 5 day of October, 1971.

/s/ Charles B. Fulton

Chief Judge

cc: Smathers & Thompson
John H. Lewis, Esq.
Carey, Dwyer, Austin, et al.

APPENDIX E

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 71-3458

MANUEL DIAZ,

Plaintiff,

versus

WESTERN VENTURES, INC., etc.,
Defendant-Third Party
Plaintiff-Appellant,

versus

DADE DRYDOCK CORPORATION, etc.,
Third Party Defendant-
Appellee.

Appeal from the United States District Court for the Southern District of Florida

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(October 19, 1972)

Before WISDOM and INGRAHAM, Circuit Judges, and BOOTLE, District Judge.

INGRAHAM, Circuit Judge: Plaintiff Manuel Diaz sued defendant ship owner, Western Ventures, Inc., for

personal injury and lost income. The defendant filed a third party action over and against plaintiff's employer, Dade Drydock Corporation, for indemnity. The case was tried to the court without a jury.

Diaz, a ship repairman, sustained injuries aboard a vessel undergoing repairs in Dade's drydock compound. Believing that he had been aboard the M/V Western Venturer when he slipped on a piece of loose pipe in a darkened engine steering room doorway, Diaz initiated this action against Western Ventures as owner. Suing in admiralty, Diaz claims that the vessel was unseaworthy and Western Ventures was negligent in failing to provide a safe place to carry out seamen's work. As expected Western Ventures denied the allegations and filed suit for indemnification against Dade Drydock, alleging a breach of Dade's warranty of workmanlike performance.

We quote the following from the findings of the district court:

> ". . . On cross-examination the Plaintiff admitted that he did not know the name of the vessel on which he fell but his supervisor told him the name of the vessel. He testified as to various details of the appearance of the vessel but was unable to recognize photographs of the engine steering room of the sister ship of the M/V 'Western Venturer,' which vessel was identical to the 'Western Venturer,' according to Earl Truesdell, the Defendant's Port Representative.
>
> "Steve Gallechio, the Plaintiff's supervisor at the time in question, testified that the didn't know

the name of the vessel on which the Plaintiff fell and John Albrecht testified that he did not witness Plaintiff's injury nor did he help the Plaintiff out of the engine steering room after the fall. Earl Truesdell, the Defendant's Port Representative, testified as to various details of the 'Western Venturer' which did not to any extent coincide with Plaintiff's description of the vessel upon which he was injured. Truesdell further testified that he was in the engine steering room on the day prior to the alleged accident and the day after the alleged accident and the lights in said room were working.

"The Court finds that it cannot and does not accept Plaintiff's version of the alleged accident as credible and worthy of belief and, accordingly, based upon the entire testimony including that of Truesdell, whose honesty and credibility impressed the Court, the Court finds that the Plaintiff did not sustain any injuries aboard the M/V 'Western Venturer' as alleged and complained of in this litigation."

The district court entered a partial final judgment in accord with his findings and dismissed Diaz's suit. Diaz did not appeal. The court, however, retained 'Western Ventures' indemnity action against Dade to determine which party should bear the costs and expenses, including attorney's fees, in the successful defense of the first part of the action.

After reviewing the law of indemnity, the district court noted that a factual determination of Dade's breach

of warranty of workmanlike performance had not yet arisen because Diaz had been unsuccessful in proving the threshold issue of injury aboard the M/V Western Venture. Holding that a finding of breach of a warranty of workmanlike performance was a prerequisite to an award of attorney's fees, the district court denied indemnity. Western Venture appealed. We AFFIRM.

At the outset we are not concerned with those general principles of insurance law regarding wrongful denial of coverage or abrogation of a contractual duty to defend a lawsuit. Liability for a defense's litigation expenses in a *Sieraki-Ryan-Yaka-Italia*[1] case is governed by the same principles as govern the award of indemnity in the general case. *Hobart v. Sohio Petroleum Co.*, 445 F.2d 435 (5th Cir., 1971).

The district court correctly concluded that in such a case indemnity must flow from a breach of a warranty of workmanlike performance. *Delaneuville v. Simonsen*, 437 F.2d 597 (5th Cir., 1971). As we recently stated in *Sandoval v. Mitsui Sempaku K. K. Tokyo*, 460 F.2d 1163 (5th Cir., 1972):

> "Under the Ryan Doctrine, one who performs maritime services for a shipowner impliedly warrants that he will perform the services in a workmanlike manner. When breach of that obligation renders the vessel unseaworthy and imposes absolute liability on the owner for the consequences of that unseaworthiness, the party must

[1]Sea Shipping Co. v. Sieracki, 328 U.S. 85 (1948); Ryan Stevedoring Co., Inc. v. Pan-Atlantic SS Corp., 350 U.S. 124 (1956); Reed v. SS Yaka, 373 U.S. 410 (1963); Italia Societa, etc. v. Oregon Stevedoring Co., 376 U.S. 315 (1964).

indemnify the shipowner on account of its breach."

If obligated to indemnify by virtue of a breach, the obligation would extend to the litigation expenses of defending this suit. *Massa v. C.A. Venezuelan Navigacion*, 332 F.2d 779 (2nd Cir., 1964); *Strachan Shipping Co. v. Koninklyke Nederlandsche Stoomboot Maatschappy*, N.V., 324 F.2d 746 (5th Cir., 1963). But whether an independent contractor has breached his warranty of workmanlike performance is primarily a question for the trier of fact. *Delaneuville v. Simonsen*, *supra*. Here, both Western Ventures and Dade moved for summary judgment on this issue. The district court's findings support its denial of indemnity and preclude operation of the *Strachan Shipping Co. v. Koninklyke, etc.*, *supra*, principle.

Appellant on appeal raises a "scare" argument. It argues that to presage indemnity for defense expenses upon a factual determination that a warranty of workmanlike performance has been breached places a premium on the vessel losing the initial round to the surrogate seaman. Thus it argues a vessel seeking *Ryan* indemnity will confess its unseaworthiness and will endeavor to establish a breach of warranty of workmanlike performance. This argument fails to appreciate that not all injuries to employees of independent contractors result from breaches of a warranty of workmanlike performance, *United States Lines v. Williams*, 365 F.2d 332 (5th Cir., 1966), or that indemnity is not automatic in cases where the employee has "caused" his own injury. *Lusich v. Bloomfield SS Line*, 355 F.2d 770 (5th Cir., 1966). Rather the employee's conduct is a factor to be considered in determining the contractor's breach. *United*

States Lines v. Williams, supra. Moreover, indemnification for expenses of defense without a finding of a breach of warranty of workmanlike performance converts the independent contractor into an insurer against specious lawsuits filed by his employees. Surely this extends beyond any operational connection between the work to be performed and a breach of a warranty that the work will be performed in a workmanlike manner. It is this latter element which gives rise to indemnification. Nor does *Hill v. Flota Mercante Gran Colombiana S.A.*, 267 F.Supp. 380 (E.D.,La., 1967), aff'd. per curiam 405 F.2d 878 (5th Cir., 1969), stand for a contrary proposition. There indemnification for expenses of defense was permitted where the employee of the stevedoring company injured himself aboard the Republica del Equador when he tried to squeeze through a hatch opening which was too narrow for him, or, conversely stated, for which he was too big. Though the district court in *Hill* did not state its holding in terms of a breach of warranty of workmanlike performance, implicit in its decision was a finding of sufficient operational connection between the fact of injury and the warranty of workmanlike performance that a breach could be found. The court stated:

> "At the time of trial his claims had narrowed to the contention that he was too big for the hatch opening. If anyone could have guarded at all against the claim, it was the stevedore who hired him."

The judgment of the district court denying indemnification for successful defense expenditures in the absence of a finding of a breached warranty of workmanlike performance is AFFIRMED.

APPENDIX F

Rule 14.

THIRD—PARTY PRACTICE

(a) When Defendant may Bring in Third Party. At any time after commencement of the action a defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him. The third-party plaintiff need not obtain leave to make the service if he files the third-party complaint not later than 10 days after he serves his original answer. Otherwise he must obtain leave on motion upon notice to all parties to the action. The person served with the summons and third-party complaint, hereinafter called the third-party defendant, shall make his defenses to the third-party plaintiff's claim as provided in Rule 12 and his counterclaims against the third-party plaintiff and cross-claims against other third-party defendants as provided in Rule 13. The third-party defendant may assert against the plaintiff any defenses which the third-party plaintiff has to the plaintiff's claim. The third-party defendant may also assert any claim against the plaintiff arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff. The plaintiff may assert any claim against the third-party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff, and the third-party defendant thereupon shall assert his defenses as provided in Rule 12 and his counterclaims and cross-claims as provided in Rule 13. Any party may move

to strike the third-party claim, or for its severance or separate trial. A third-party defendant may proceed under this rule against any person not a party to the action who is or may be liable to him for all or part of the claim made in the action against the third-party defendant. The third-party complaint, if within the admiralty and maritime jurisdiction, may be in rem against a vessel, cargo, or other property subject to admiralty or maritime process in rem, in which case references in this rule to the summons include the warrant of arrest, and references to the third-party plaintiff or defendant include, where appropriate, the claimant of the property arrested.

(b) When Plaintiff May Bring in Third Party. When a counterclaim is asserted against a plaintiff, he may cause a third party to be brought in under circumstances which under this rule would entitle a defendant to do so.

(c) Admiralty and Maritime Claims. When a plaintiff asserts an admiralty or maritime claim within the meaning of Rule 9(h), the defendant or claimant, as a third-party plaintiff, may bring in a third-party defendant who may be wholly or partly liable, either to the plaintiff or to the third-party plaintiff, by way of remedy over, contribution, or otherwise on account of the same transaction, occurrence, or series of transactions or occurrences. In such a case the third-party plaintiff may also demand judgment against the third-party defendant in favor of the plaintiff, in which event the third-party defendant shall make his defenses to the claim of the plaintiff as well as to that of the third-party plaintiff in the manner provided in Rule 12 and the action shall proceed as if the plaintiff had commenced it against the third-party defendant as well as the third-party plaintiff.

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MICHAEL RODAK, JR., CLERK

in the

Supreme Court

of the

United States

OCTOBER TERM, 1972

NO. 72-986

WESTERN VENTURES, INC.,
Petitioner,

vs.

DADE DRYDOCK CORPORATION,
Respondent.

BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Respondent adopts Petitioner's statement of the case and, in addition, states that nowhere in the trial court's findings of fact and conclusions of law (Petitioner's A. 1-6) does the trial court find that either the employee of the shipyard or the shipyard itself was guilty of a breach of its implied warranty of performing the services in a workmanlike manner.

ARGUMENT

Petitioner concludes his argument by stating he has been penalized "for a job well done." We wish to state at the outset that neither the Fifth Circuit nor the trial court penalized the petitioner "for a job well done." The petitioner's claim for indemnity was denied because there was no finding by the trial Court that the shipyard or the employee of the shipyard, who was the Plaintiff in the trial court, violated the implied warranty of performing the services in a workmanlike manner.

It is well settled in law, if where a shipowner is sued by an employee of a stevedoring company or a shipyard, whether the shipowner successfully defends the claim or not, he is entitled to recover his expenses of defending from the stevedoring company or the shipyard *only* where there has been a finding of fact that the injuries were the result of the stevedoring company or the shipyard's breach of the implied warranty to perform the services in a workmanlike manner.

The above statement is supported in *Damanti vs. A/S Inger*, 314 F.2d 395 (2nd Cir. 1963) where the Court stated:

> "The elements the ship must establish to recover indemnity from the stevedore, are first that the settlement was reasonable under all the circumstances and second, that the stevedore was guilty of a breach of the warranty of workmanlike service and has no defense against the ship's indemnity claim."

In *Denaro vs. United States*, 337 F.2d 275 (2nd Cir. 1964) in which the United States was the shipowner and Denaro, a shoreside worker, the Court stated:

> "The United States is not entitled to be indemnified by Denaro's employer, American Stevedores, Inc., for the legal expenses incurred in defending itself, for the District Judge found, with ample support in the record, that there was no breach of the warranty of workmanlike service."

In the case before the Court, the trial court and the Fifth Circuit denied petitioner's claim for indemnity because there was no finding in the trial court of a breach of the implied warranty to perform the services in a workmanlike manner. Petitioner admits on page 6 of his petition that this was the basis of the decision of the trial court and the Fifth Circuit. Petitioner alleges that such a decision is in direct conflict with the decision of the United States Court of Appeals for the Fourth Circuit in *American Export Lines vs. Norfolk Shipbuilding and Drydock Corp.*, 336 F.2d 525, 1965 A.M.C. 167 (Fourth Cir. 1964). That decision of the Fourth Circuit *is not* in conflict with the decision of the Fifth Circuit in the case presently before the Court. In the case in the Fourth Circuit, the jury found that the shipyard was solely responsible, therefore, the jury found as a fact that there had been a breach of the warranty of performing the services in a workmanlike manner by the shipyard and therefore, the shipowner was entitled to indemnity from the shipyard. Indemnity was allowed in that case and there was a finding of the breach of the implied warranty of workmanlike service which is consistent with the decision of the Fifth Circuit in holding that there must be a breach of that warranty before there can be indemnity.

Petitioner has also cited the case of *Hill vs. Flota Mercante Grancolumbiana S. A.*, 267 F.Supp. 380 (Ed., La. 1967), Aff'd 405 F.2d 878 (5th Cir. 1969), Cert. Denied 395 U.S. 934 (1969), in which the district judge held that both the shipowner and the employer were blameless but due to the unusual circumstances involved in that case, the economic costs of defending the main action should be borne by the employer because he was in a better position to have prevented the whole thing from the start. In that case, the Plaintiff was a stevedore who was an unusually large man and had injured himself while attempting to go through a hatch. The injury was, in part, due to the size of the man. The district judge rested his decision on the basis that the employer probably should not have hired such a large man for this type of work and therefore, the employer was in the best position to have prevented the whole thing from the start. Based on this reasoning, the district judge allowed the vessel owner to recover the cost of defense from the employer who had hired this unusually large stevedore.

It should be noted that none of these unusual facts of the *Hill* case, *supra*, pertain to the case now before the Court. There is absolutely nothing in the record of anything unusual about this Plaintiff's physical condition or size that had anything to do with this case. Therefore, the reasoning of the Judge in the *Hill* case cannot be applied in the case now before the Court and the case now before the Court should be decided on the well settled rule of law that where there is no breach of the warranty of workmanlike performance, there can be no indemnification.

It should also be noted that Petitioner indicates that the *Hill* case, *supra*, was affirmed by the Fifth Circuit. In

reviewing the decision of the Fifth Circuit, it is clear that the Fifth Circuit decision pertains only to the main action between Hill and the shipowner. The third party defendant did not appeal and the Fifth Circuit decision affirms only the decision of the main action.

Petitioner also argues that he should not be penalized for a successful defense. We wish to point out to the Court that when this case was actually tried in the trial Court, the Third Party Defendant, the shipyard, and its counsel were present at the counsel table and took an active part in the presentation of evidence, examination and cross-examination of the witnesses and played an active role in the trial. We would hope that our activity at the trial was to some degree partially responsible for the successful defense of the main action.

It is simply our position that petitioner is not entitled to recover his expenses because there was no finding by the trial court that the shipyard or the employee of the shipyard, who was the Plaintiff in the trial court, violated the implied warranty of performing the services in a workmanlike manner. There is not a single case cited by petitioner which disagrees with this statement of the law. In each appellate decision cited by petitioner, there was a finding that either the employee who was suing the shipowner or the employer of the employee, stevedore or shipyard, whichever was involved, was guilty of a breach of the implied warranty of workmanlike service and recovery was allowed for that reason.

In *Manning vs. M/V Sea Road*, 417 F.2d 603 (5th Cir. 1969), there was a manhole cover missing and in *Provenza*

vs. American Export Lines, Inc., 324 F.2d 660 (4th Cir. 1963), cert. denied, 376 U.S. 952 (1964), I beams were left loose on the deck when they should have been lashed.

The petition should be denied because petitioner has not cited a single appellate case in conflict with the decision of the Fifth Circuit in the case before the Court. It should be denied because this is not an important federal question which should be settled by this Court. All of the circuits allow indemnity only where there has been a breach of the implied warranty to perform the services in a workmanlike manner. Certainly, the decision of the Fifth Circuit does not call for exercise of this Court's power of supervision because the Fifth Circuit has simply denied indemnity where there was no showing of the breach of the implied warranty to perform the services in a workmanlike manner which is what is required.

CONCLUSION

For the foregoing reasons, respondent prays that this Court deny the petition for Writ of Certiorari.

Respectfully submitted,

CAREY, DYWER, AUSTIN,
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650 Seybold Building
Miami, Florida 33132
Attorneys for Respondent

By JESSE W. MILLER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was mailed to SMATHERS & THOMPSON, Attorneys for Petitioner, 1301 Alfred I. duPont Building, Miami, Florida 33131, JOHN H. LEWIS, ESQ., Attorney for Plaintiff, 1008 Concord Building, Miami, Florida 33130, and RAYMOND GREENE, ESQ., Co-Counsel for Dade Drydock Corporation, 254 Security Trust Building, Miami, Florida 33131, this 2 day of February, 1973.

JESSE W. MILLER

By_____